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Punitive Damages

I am honored to address the members of the 6th Circuit Court of Appeals and the Federal District Court Judges from Ohio, Michigan, Tennessee and Kentucky, together with my fellow lawyers, on the subject of punitive damages.

The U.S. Supreme Court has decided at least six punitive damages cases in the past thirteen years. The Court's focus has been establishing that due process constraints the imposition of punitive damages and requires that the courts provide post-verdict judicial review of any such award.

In *Honda Motor Co. v. Oberg*, the Court found that due process requires post-verdict judicial review of all punitive awards.

In *BMW of North America v. Gore*, the Court established the now-famous "guideposts" in reviewing punitive damages: reprehensibility of defendant's conduct, the ratio of compensatory to punitive damages, and the amount of comparable fines or penalties. It is not entirely clear even today how the Court sees the "guideposts" as relating to the standards that juries are given in the instructions used in most states.

In *Cooper Industries v. Leatherman Tool* case in 2001, the court held that appellate review of punitive damage awards must be *de novo.*

In my view, the Court's most recent punitive damages decision, *State Farm v. Campbell*, represents an important shift in the Court's focus. In the course of applying the BMW guideposts and clarifying the range of compensatory/punitive ratios appropriate under the due process clause, the Court made two additional points that have important implications for trials of punitive damages cases. First, that evidence of the defendant's allegedly wrongful conduct must have a "nexus" to the harm the trial plaintiff suffered, and, second, that evidence of defendant's net worth is not probative of the appropriate amount of punitive damages.

State Farm should open new areas of constitutional inquiry in the lower courts concerning the type of evidence the jury should and should not hear regarding punitive damages and the procedural safeguards necessary to ensure the jury considers only the right evidence regarding the right issues at the right time.

Keep in mind, punitive damages are premised upon the dual justification of punishment and deterrence. They are closer to a criminal penalty than to a compensatory remedy, and yet they are imposed without any of the safeguards that apply in a criminal trial.

As the court noted in State Farm, "Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protection applicable to a criminal proceeding. This increases our concerns over the imprecise matter in which punitive damage systems are administered."

Most states now permit punitive damages to be awarded even in strict liability cases. The whole theory of strict liability is to compensate injured parties without regard to the "fault" of the defendant. Strict liability expanded manufacturers' scope of liability by orders of magnitude, but the *quid pro quo* was supposed to be a more predictable legal environment. The specter of punitive damages in strict liability cases makes that impossible.

State Farm teaches that we must impose constitutional due process constraints on punitive damages earlier in the trial process. The procedural mechanisms by which punitive damages are tried can be outcome determinative. I would, therefore, ask you to consider the following three points, all of which are consistent with State Farm:

1. The court as gatekeeper

2. Trifurcation

3. Restraint on closing arguments

The Court As Gatekeeper

Due process cannot be relegated to a judicial afterthought. Not everything is curable by post-verdict review. Public companies suffer enormous harm when an excessive punitive damages verdict is rendered, before judicial review can take place. This chilling effect is compounded by the obligation to bond such a verdict in order to appeal it.

The trial courts have a due process obligation to be the "gatekeepers" for punitive damages claims. In other words, we need a *Daubert-like* analysis for punitive damages claims. I note that Illinois, by statue, prohibits a plaintiff even from seeking punitive damages in the complaint unless the court finds, after a hearing, that there is a reasonable likelihood that the facts will support an award of punitive damages.

I would ask the trial courts to resist the urge simply to defer all decisions concerning punitive damages based on the possibility that the jury will render them moot. What will really happen is that the threat of punitive damages will shift the parties' focus from fair compensation to lottery-like windfalls, and it will become harder, not easier, to resolve the case short of trial.

The opportunities for the trial court to serve the gatekeeper function regarding punitive damages claims come early and often at trial. State Farm tells us that the evidence plaintiff claims supports an award of punitive damages must be linked directly to the harm suffered by the plaintiff. Evidence of unrelated bad acts or harm done to others is not only irrelevant, its admission denies the defendant due process rights.

Due process should preclude evidence of defendant's wealth. In *Haslip,* the Court pointed out - twice - that Alabama did not permit the admission of the defendant's wealth with respect to punitive damages, and in *State Farm* the Court again implied that wealth evidence is inconsistent with due process. Drunk driving is indisputably life-threatening conduct, but we do not increase the fines for drunk drivers who happen to be wealthy. Why? Because we really do not believe that it is either fair or necessary to deter the conduct. When you receive a speeding ticket, you are not told to bring along

your tax return to court so that the judge can increase the fine for those of us with above average incomes.

I know that courts for decades have repeated the adage that a civil jury must know how much money a defendant has in order to "send a message." If that is correct, why does this adage have no application whatsoever in the criminal or civil fine context? And in those contexts, it is the courts and the legislatures that are deciding the degree of punishment and deterrence to be administered. They do so pursuant to legal standards published ahead of time, while a civil jury with no prior experience is asked to decide punitive liability on an ad hoc basis, with little or no meaningful guidance.

And if you think that last comment was unfair, I would ask you to consider how helpful it is when a jury is told - as it is in many states - that it can award punitive damages if the defendant's conduct was "oppressive."

If two tortfeasors engage in exactly the same misconduct, causing exactly the same harm, there is no constitutionally permissible basis for imposing a larger punitive award on one of them simply because, through unrelated, perfectly legal conduct, he or she amassed greater wealth.

Trifurcation

In the civil context, such protections should include the defendant's right to trifurcation of the trial. In a trifurcated trial, phase one concerns only compensatory liability and damages, phase two focuses solely on liability for punitive damages, and phase three addresses only the amount of punitive damages.

Why does trifurcation matter? Two reasons: First, it allows the jury to hear the right evidence only at the right time, and only with respect to the right issues. The jury's compensatory decision should be untainted and not be affected by the claimant's counsel's argument that the defendant should be punished. For example, evidence of a defendant's subsequent remedial measures is ordinarily inadmissible to prove its negligence. It is clearly relevant, admissible evidence, however, concerning the reprehensibility of the defendant's conduct and the need (or lack thereof) to "send a message."

Consider punitive damages in the mass tort context. Is evidence that the defendant has been sued for billions of dollars in compensatory damages by tens of thousands of claimants admissible to show the defendant owes compensatory damages to a particular trial plaintiff? Obviously not. Is that information admissible to prove reprehensibility? Not according to State Farm because there is no "nexus" to the individual plaintiff's injuries. That information clearly is relevant and admissible in the third phase of the trial - quantifying the punitive award - because it goes to whether a "message" has already been sent to and received by the defendant and whether a satisfactory measure of punishment has been imposed on the defendant. *State Farm* reminds us that there is a punitive element to many forms of compensatory damages (e.g. emotional distress damages).

The second reason that trifurcation matters is practical. It allows a jury and the parties to stop and reassess the case knowing the result concerning the compensatory claim. That added perspective will lead to fewer phase II and phase III trials and fewer runaway punitive verdicts.

Closing Argument

Due process must restrain counsel's closing arguments, and must do so without requiring defense counsel to object during plaintiffs' closing. Most lawyers and judges in this room who are my contemporaries can recall closing arguments from thirty years ago. I doubt my contemporaries here today will deny that many summations that are considered acceptable now would not have been tolerated three decades ago. Counsel have constantly "pushed the edge of the envelope" on closing argument and, because summations are governed more by custom and tradition than by law, they have managed to secure at least tacit judicial approval for some arguments that are fundamentally inappropriate.

There is ample evidence that mere repetition of excessive amounts of punitive damages has a numbing effect on jurors' sensibilities. The effort often starts in *voir dire*, when plaintiff's counsel seeks to strike any potential juror who balks at the prospect of awarding fifty million dollars or one hundred million dollars in punitive damages "if the

evidence at trial supports that." The trial courts must restore reasonable limits on such conduct.

Let me close with a warning that the problem of punitive damages in mass tort litigation is real and does not just show up sporadically. There is a punitive component in virtually every mass tort case. The plaintiffs' counsel rattle the punitive saber in every case. The ability to resolve the case is impaired by the punitive component.

We live in a world of finite resources - there are real life consequences to draining enormous amounts of money out of companies through the tort system. Companies go bankrupt, and people lose jobs. People lose their retirement funds and health care benefits. Communities suffer.

The number of enormous punitive damages awards is not the appropriate benchmark for measuring whether punitive awards need to be reined in. We have a tort system that provides for the deserving plaintiff to be fully compensated. Punitive damages are, by all accounts, a windfall. If it were ever in doubt, it is now clear that due process demands that the trial courts exercise greater control over the trial of punitive damages claims.

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